IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

Criminal Writ Petition No.781 of 2007

M/s.Argus Industries Ltd. Petitioner

Vs.

M/s. Zen Enterprises & anr. Respondents

Mr.Ganesh Gole for petitioner.

Mr.D.S.Chandnani i/b. M/s.Lexim & Associates for resp.no.1.

Mr.Y.M.Nakhawa, APP for State.

CORAM: B.H.MARLAPALLE, J.

July 27, 2007.

P.C.

1. Heard Mr.Ganesh Gole, the learned counsel for the petitioner who is accused in C.C.No.677 of 2001 and the said case has been filed for an offence punishable under Section 138 of the Negotiable Instruments Act, 1881. The complainant payee had submitted an affidavit by way of examination-in-chief and thereafter the accused, the present petitioner submitted an application claiming to be an application under Section 145(2) of the Negotiable Instruments Act and prayed as under:

"Under the circumstances, the Accused most respectfully prays that this Hon'ble Court be pleased to exercise its jurisdiction under sub-section (2) of Section 145 of the Negotiable Instruments Act and pass suitable orders for summon and examine the said Mr. Purshottam Das Agarwal, proprietor of M/s. Zen Enterprises so that his examination in chief can be recorded, with regard to the facts stated by him in his Affidavit evidence."

2. The learned Judge of the trial Court after considering the say filed by the complainant, was pleased to reject this application by relying upon series of judgments of this Court and one of them being in the case of KSL & Industries Ltd. Vs. Mannalal Khandelwal **[2005 (1) Bom.C.R. (Cri.) 520]** which has been rendered by a Division Bench of this Court and subsequently the said view has been followed by the Single Benches. The order passed by the trial Court on 1/12/2006 came to be challenged in Criminal Revision Application No.15 of 2007 and the revision was rejected. Hence this petition.

3. At the first instance Mr.Gole submitted that the view taken by this Court in the case of KSL & Industries Ltd. (Supra) as well as Harischandra Biyani Vs. Stock Holding Corporation of India Ltd. & anr. **[2006 All MR (Cri) 1114]** and Indo International Ld. & anr. vs. State of Maharashtra & anr. **[2005 (2) Bom.C.R. (Cri.) 729]** is a subject matter of challenge before the Supreme Court and by way of interim order, the operation of the judgments has been stayed. In the instant case undoubtedly the complainant has filed his affidavit by way of examination-in-chief and he will have to stand in the witness box and affirm the same regarding the facts stated therein and that they are as per the knowledge and information and thereafter the cross-examination by the accused will follow, if the accused so desires. It was contended by Mr.Gole that as per Section 145(2) of the Negotiable Instruments Act, the affiant has to be called to record his examination-in-chief even though an affidavit has been filed as required under Section 145(1) by way of examination-in-chief. This contention does not go well with the intention of the Legislature as spelt out in the scheme of Section 145(2) of the Act. Once

an affidavit by way of examination-in-chief has been presented, the Court has to summon an affiant and record his affirmation about the said affidavit being as per his knowledge and information to be correct and the facts stated therein are affirmed. There is nothing called recording of examination-in-chief at the instance of the complainant's Advocate. Once the affidavit has been verified by the affiant in the witness box, he is subject to cross-examination by the accused or the other party.

4. I, therefore, do not see any error committed by both the Courts below. The complaint has been pending for the last more than six years or so and it appears that the accused for some reason or the other is interested in delaying the trial of the complaint. The trial Court has noted that affidavit by way of examination-in-chief was filed and since long the matter was pending for cross-examination.

5. Though the interim orders passed by the Apex Court have been placed on record, the issue involved in this petition, having regards to the prayer made in the application as reproduced hereinabove, does not appear to be the same which could be the subject

matter for consideration before the Apex Court.

6. Hence the petition fails at the threshold and the same is hereby rejected. Trial is expedited.

(B.H.MARL